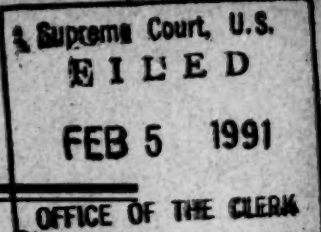


(2)

No. 90-787



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**In the Supreme Court of the United States**

OCTOBER TERM, 1990

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F.L. FARR, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ET AL.

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

**BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION**

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### **QUESTION PRESENTED**

**Whether the court of appeals' opinion is so uninformative that it violates petitioner's due process rights.**



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## **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. A1-A5) is unpublished, but the decision is noted at 904 F.2d 703 (Table). The opinion of the district court (Pet. App. B1-B8) is unreported.

## **JURISDICTION**

The judgment of the court of appeals was entered on May 25, 1990. A petition for rehearing was denied on June 26, 1990 (Pet. App. D1). The petition for a writ of certiorari was filed on September 24, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. In December 1969, petitioner entered into a contract with RepublicBank Fort Worth to lease a safe deposit box. Pet. App. B1. The contract provided:

Lessor shall not be responsible for loss of or damage to the contents of any [safe deposit] box caused by burglary, theft, embezzlement, fire, flood or disappearance or destruction of contents or any part thereof. The entire risk of such loss, destruction, disappearance, or damage is assumed entirely by the lessee.

Pet. App. B3.

Thereafter, petitioner failed to pay rent on the box. As a result, the bank drilled the box open and placed its contents in a separate locker. Pet. App. B2.

In May 1980, petitioner appeared at the bank (apparently for the first time since 1969) and asked to examine the contents of the box. Upon examining the contents, petitioner asserted that several coins he had placed in the box in 1969 were missing, and that other coins minted since 1969 had been added by someone other than petitioner. Pet. App. B2.

In January 1983, petitioner filed suit in Texas court asserting contract and tort claims against the bank under state law. Pet. 5; Pet. App. A1. In July 1988, the bank was declared insolvent and the Federal Deposit Insurance Corporation (FDIC) was appointed as its receiver. Pet. 5. The FDIC removed the case to federal district court and filed a motion for summary judgment. Pet. 5-6; Pet. App. B1.

2. The district court granted summary judgment for the FDIC. Pet. App. B1-B8, C1-C3. The court held (Pet. App. B2-B3) that the lease contract clearly assigned to petitioner the risk of loss of the contents of the box. The court also noted (Pet. App. B5) that petitioner examined the coins on May 22, 1980, but did not file suit until January 10, 1983. Consequently, petitioner's tort claim for conversion was

barred by the two-year statute of limitations of Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a) (Vernon 1986). Pet. App. B4-B5.

Although the district court permitted petitioner to amend his complaint to assert a claim under the Texas bank escheat statute, Tex. Prop. Code Ann. § 73.003 (Vernon 1986), Pet. App. B6, the court subsequently held that there is no private right of action under that statute. Pet. App. C1-C3. Accordingly, the district court dismissed this claim as well. *Ibid.*

3. The court of appeals affirmed for "the reasons set forth in the district court's orders," Pet. App. A3, and the additional reasons stated in its unpublished opinion. Pet. App. A1-A5. The court of appeals agreed with the district court that petitioner's tort claims were barred by the two-year statute of limitations. Pet. App. A3. The court also agreed with the district court that there is no private right of action under the Texas bank escheat statute. Pet. App. A3-A4. As to petitioner's contract claims, the court noted that the lease contract clearly placed the risk of loss on petitioner, and observed that petitioner "points to no reason or authority why that provision of that contract is not binding." Pet. App. A4. The court rejected petitioner's claim that the bank had an obligation of safekeeping pursuant to a pledge agreement executed by him in connection with a loan, because the pledge agreement expired when it was completely performed in 1972. *Ibid.* Finally, the court rejected petitioner's claims based on unwritten agreements between himself and the bank. Under this Court's decision in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), the court said, the FDIC is not bound by such agreements. Pet. App. A4-A5.

### ARGUMENT

Petitioner contends that the decision of the court of appeals violates his due process rights "through its lack of



specificity, unreasoned explanations and clearly erroneous conclusions." Pet. i. That contention is frivolous.

1. Petitioner correctly recognizes that "there are many obvious reasons for non-published and summary opinions," Pet. 9, and that "it is generally no error for cases to be dealt with by summary opinion," Pet. 8. Although this Court occasionally has remanded cases in which the court of appeals failed to explain the basis for its judgment, see, e.g., *Northcross v. Memphis Board of Educ.*, 412 U.S. 427 (1973); *Taylor v. McKeithen*, 407 U.S. 191 (1972), it has never suggested that litigants have a right under the Due Process Clause to a full written opinion on appeal. On the contrary, this Court has said that "the courts of appeals should have wide latitude in their decisions of whether or how to write opinions. That is especially true with respect to summary affirmances." *Taylor v. McKeithen*, 407 U.S. at 194 n.4.<sup>1</sup>

In any event, there is no basis for petitioner's assertion that the court of appeals' opinion in this case is so uninformative that it left the parties "at a loss to understand what has happened." Pet. 10. The court clearly and succinctly explained its reasons for rejecting petitioner's claims and affirming the decision of the district court. It expressly adopted the reasons set out in the district court's orders. Pet. App. A3. In addition, it specifically stated that (1) petitioner's tort claim is barred by the two-year statute of limitations, (2) there is no private right of action under the Texas

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<sup>1</sup> The Fifth Circuit has established detailed criteria for determining whether to publish its opinions, see Rule 47.5.1, Fifth Circuit Rules, and whether to affirm a judgment of the district court without opinion, see Rule 47.6. In this case, it appears that the court of appeals, consistent with its own rules, might have affirmed the judgment of the district court without opinion. See Rule 47.6(4) (providing for affirmance without opinion in a case of summary judgment in which no genuine issue of material fact has been properly raised, no error of law appears, and the opinion would have no precedential value).

bank escheat statute, and (3) the provisions of the lease contract placed the risk of loss on petitioner. Pet. App. A2-A4. This straightforward explanation of the basis for the court's decision is not "unclear or insufficiently reasoned," Pet. 10, and certainly is not constitutionally inadequate.

Petitioner also complains (Pet. 12-15) that unpublished opinions give the government an opportunity to " 'key' issues to matters considered routine by the opinion selection committees and to, thus, have a much greater opportunity to have cases given summary handling and, thus, diminish the process afforded opposing litigants." Pet. 13. Even if this were a valid criticism of unpublished opinions in general, petitioner does not suggest that he was harmed by the court's decision not to publish its opinion in this case. Instead, petitioner suggests (*ibid.*) that the government exploited its superior knowledge of legal issues to inject into its brief a discussion of this Court's decision in *D'Oench, Duhme & Co. v. FDIC*, *supra*. According to petitioner, *D'Oench, Duhme* was then "duly and cryptically cited" by the court of appeals. Pet. 13. But *D'Oench, Duhme* is a leading case on the scope of FDIC liability and was clearly cited by the court of appeals for the proposition that the FDIC cannot be liable to petitioner on the basis of alleged unwritten agreements with the bank.<sup>2</sup> Pet. App. A4-A5.

2. Petitioner's other arguments warrant no further review. He asserts (Pet. 17-20) that the court of appeals was incorrect in referring to the district court's first order granting partial summary judgment as "unappealed." See Pet. App. A2. In fact, however, petitioner did not file a notice of appeal until after the district court had issued its second order disposing of the entire case. See Pet. 7. On appeal,

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<sup>2</sup> Petitioner now insists that there were no such unwritten agreements. Pet. 36. If that is so, he can hardly complain about the citation of a case holding that such agreements are unenforceable.

the court of appeals reviewed and affirmed both orders of the district court. Thus, there is nothing for petitioner to complain about.

Petitioner also renews his claim (Pet. 20-24) that he has a private right of action under the Texas bank escheat statute, Texas Prop. Code Ann. § 73.003 (Vernon 1986). The courts below correctly resolved this issue of state law. The escheat statute expressly allows suit only by the Texas Attorney General. See Tex. Prop. Code Ann. § 74.705 (Vernon Supp. 1991).

Petitioner argues (Pet. 26-35) that the contractual provision assigning the risk of loss to petitioner was "super-[s]eded" by the creation of a bailment when the bank held a set of keys to the deposit box for a period ending in 1972 pursuant to a pledge agreement. Pet. 28-29. But both courts below concluded that this claim sounds in tort rather than contract, Pet. App. A4, B5, and that petitioner's tort claim is time-barred.<sup>3</sup> See Pet. App. B5-B6.

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<sup>3</sup> Petitioner asserts (Pet. 25-26) that he alleged facts that, if true, would justify tolling the two-year statute of limitations. In support of this assertion, he cites only Pet. App. F6-F7. See Pet. 25. The cited pages do not refer to any events that occurred after petitioner examined the contents of the locker in May 1980.

**CONCLUSION**

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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**FEBRUARY 1991**